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UNFAIR FOREIGN COMPETITION ACT OF 1979, S. 938

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

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(II)

UNFAIR FOREIGN COMPETITION ACT OF 1979, S. 938

THURSDAY, DECEMBER 6, 1979

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST,
MONOPOLY AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room 5110, Dirksen Senate Office Building, Senator Charles McC. Mathias, Jr. (acting chairman), presiding.

Present: Senators Mathias and Thurmond.

Also present: Peter Chumbris, chief minority counsel; J. Michael Cooper, counsel; Marilyn Falksen, chief clerk; Ralph Oman, counsel to Senator Mathias; and Jacqueline Beshar, staff assistant.

OPENING STATEMENT OF SENATOR MATHIAS

Senator MATHIAS. The hearing will come to order.

I want to thank everyone for being here today and for being willing to participate and appear in this hearing on Senate bill 938, the unfair foreign competition bill of 1979.

There are a number of distinguished witnesses here today. I would suggest that unless anyone has particular time constraints that we take them in the following order: Mr. Barden, Mr. Patterson, Mr. Beispel, Mr. Fisher, and Mr. Hartquist.

In the 96th Congress, a number of Senators, including myself, have focused on ways to increase international trade, thereby improving our balance of trade situation which is one of the underlying causes of our current economic distress. Through negotiating efforts, including the multilateral trade negotiations, the United States has reduced many of the barriers to international trade in return for similar reductions from trading partners. This is a good trend. It promotes production. It creates jobs. It encourages efficient allocation of resources on a worldwide scale. It ought to help to reduce our trade deficit. As long as all of our competitors play by the rules, I think that American workers can more than hold their own to the benefit of the workers and businesses and consumers alike.

However, with this relaxation of restrictions on imports, I think we need to insure that no one takes advantage of what may appear to be our vulnerability. I think it is commonly recognized that competition has not always been fair competition, that goods are often sold below fair market value causing massive dislocations in domestic industries.

pages tightly bound

I believe that we need a clear, coherent and enforceable policy toward dumping. Business needs to know what conduct the law forbids, and it should be able to collect damages swiftly when the laws are violated.

One of the bulwarks against predatory behavior from abroad is the antidumping law. For that reason, I have introduced Senate bill 938, to amend the antitrust laws to include dumping within the definition of behavior prohibited by those laws. Dumping is one of the worst anticompetitive acts and I think we should give both the Antitrust Division and the injured American companies the right to sue for treble damages under the antitrust laws by including it in the company of our antitrust laws which are the basic tenets of our free enterprise economy, we give public notice of the importance that we attach to predatory dumping.

In the definition of dumping I would include both selling below marginal costs of production and selling in the U.S. market below the price in the home market.

Currently, the antidumping laws are enforced by the Treasury Department and I must state candidly that I have been somewhat concerned by the reports of the rather casual way in which they have been enforced. Soon they will be enforced by the Commerce Department, but under an apparatus that seems to be similar to that which has prevailed in the Treasury.

Despite this changing of the guard, it seems to me that the discussion of this bill is entirely relevant. The bill would allow injured U.S. manufacturers and workers to collect treble damages without having to show specific intent by the importer to injure.

The question before the subcommittee is whether these proposed changes would improve the regulation and enforcement of the dumping laws and more importantly, if they would provide a more meaningful deterrent to would-be dumpers.

Our witnesses have great expertise in the antidumping laws and today we expect to learn about the extent of the problem that we face. If it appears that the problem is serious, and that this bill would help resolve the difficulties, we will then pursue the subject in further hearings. At that time, I would expect to hear from the Commerce Department and from the Antitrust Division.

As our first witness we will hear from Mr. Lynn Barden, and we are glad to welcome him this morning.

STATEMENT OF LYNN BARDEN, OFFICE OF GENERAL COUNSEL, TREASURY DEPARTMENT

Mr. BARDEN. Thank you, Mr. Chairman.

On behalf of the Treasury Department, I wish to thank you for the invitation to testify before your subcommittee in connection with your consideration of S. 938, the Unfair Foreign Competition Act of 1979. The bill which would amend the so-called Antidumping Act of 1916, is related to the Antidumping Act of 1921, which has long been administered by the Treasury Department.

I should point out the 1916 act, the act which is the subject of the bill, is not and has never been administered by the Treasury Department. It is administered by the Department of Justice.

Senator MATHIAS. You are entirely correct. The 1921 act is administered by Treasury.

Mr. BARDEN. That is correct.

Senator MATHIAS. I might say the 1916 act doesn't seem to really be administered by anybody in particular. That is one of the problems.

Mr. BARDEN. In any event, S. 938, because of its logical relationship to the 1921 act, is of interest to Treasury.

It would be most appropriate and hopefully useful to the subcommittee if the Treasury official whose primary responsibility is for the Department's administration of the 1921 act, Robert H. Mundheim, who is our General Counsel, were to be able to testify today. Unfortunately, he is out of the country this week on rather urgent matters relating to the freezing of Iranian assets and therefore is unable to be here. I am confident that he will be able to testify at any subsequent hearings that the subcommittee may schedule.

Further, it has not yet been possible, unfortunately, to formulate a departmental position on the bill which has cleared through the required interagency process. Therefore, I must restrict my statements to a few general observations. We will submit a formal position on the bill as soon as we are able to.

Returning to the bill, I believe it can be said fairly that the present Antidumping Act of 1916 has proven to be ineffective because of its requirement of proof that an exporter intends to dump and to injure a U.S. industry. Such a burden of proof is at best a very difficult thing to sustain. Since the determination of whether foreign merchandise is being sold at dumping prices normally is very complex, it is questionable whether the requirement in section 3(a) of your bill that an importer knowingly and purposely be importing at dumping prices imposes a significantly lower burden of proof. This is especially important since usually only exporters, not importers have sufficient information available to them to form any judgments as to whether dumping may be occurring.

Even exporters may find it very difficult to know whether their home market prices are above or below their prices to the United States. This is because of the frequently numerous and complex adjustments to the prices involved which must be made for such factors as differences in conditions in terms of sale and for physical differences in the merchandise sold in each market which must be made before reasonable and fair price comparisons can be accomplished.

The Department's experience in administering the 1921 act, under which most investigations require extensive analysis of facts and complex price adjustments, causes us to question the efficacy of any test based upon a showing of intent. Further, that experience in an ever-growing number of cases has shown that the 1920 act is utilized frequently by domestic industries and, in our judgment, has proven effective in bringing to a halt injurious dumping practices.

Nonetheless, in response to the growing concerns of some domestic industries and many Members of Congress that the 1921 act was not as effective as it should be, that act was substantially amended in July, of this year, as part of title 7, of the Trade Agreements Act of 1979.

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The new law which will become effective on January 1, will be administered as you said, by the Department of Commerce. It substantially reduces the time limits for determinations. It provides significantly greater opportunities for representatives of domestic industries to acquire information which is relied upon in making determinations and to participate in antidumping proceedings and it establishes more opportunities for judicial review of agency determinations made under the law.

With these changes the effectiveness of the law in dealing with problems of U.S. industries caused by dumping practices should be greatly enhanced. The subcommittee may wish to delay action on the bill until enough time has elapsed to make some judgments about the efficacy of the new law. Further, careful consideration should be given to questions concerning the logic and consistency of the bill with other provisions of U.S. law in addition to the antidumping provisions that I just mentioned.

These include the counterveiling duty law, the escape clause and market disruption provisions of the Trade Act of 1974, section 337 of the Tariff Act of 1930, and as well, the international obligations of the United States, especially the International Antidumping Code.

This concludes my statement. While, as I indicated at the beginning, I am not in a position to offer any definitive comments or take any position on the bill, I will be pleased to try to answer any questions you may have concerning our experience under the 1921 act.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Barden.

The 1916 act refers to any person importing or assisting in imports any articles from any foreign country.

The bill before us, Senate bill 938, retains essentially that same language.

Now, under the current view of the law, would it be your understanding that this language would be sufficient to allow the injured party or the Government to sue the foreign manufacturer who may have assisted in importing?

Mr. BARDEN. Well, it is my understanding that some foreign manufacturers are indeed involved in some presently pending private litigation under the 1916 act.

Senator MATHIAS. As defendants?

Mr. BARDEN. As defendants, yes. I don't think there is any other way they could be involved. But, personally, I am not conversant enough with that case or with this law to be confident that that language clearly establishes jurisdiction over foreign exporters, and in any event, even if it does, unless they have a domestic presence of some magnitude, I am not at all confident that it would be meaningful.

Senator MATHIAS. A great many of them have some sort of domestic presence though.

Mr. BARDEN. That is true.

Senator MATHIAS. In those cases it would be meaningful.

Mr. BARDEN. You are right.

Senator MATHIAS. And, of course, it would also be—even if they didn't have a domestic presence—a powerful inhibition to further activity in the United States if they were involved in such litigation.

Mr. BARDEN. That's correct.

Senator MATHIAS. In your statement you referred to the kind of difficulties that would arise in making equitable price comparisons. I think that was the phrase you used. One of the perceived shortcomings of the system as it has existed in the last few years is the lack of some sort of adjudicatory proceeding at Treasury in the determination of sales at less than fair value.

Mr. Fisher, in an article that he published in Law and Policy in international business, in 1973, investigated or reviewed that point at some length.

Now this bill, of course, will allow a private cause of action in U.S. courts and therefore, would insure a full hearing with the right of appeal to both sides. So you certainly have an immediate adjudicatory proceeding which has been lacking in the past.

Now I don't want to strain the limits of your jurisdiction here. You have explained very carefully that your mandate is limited, but wouldn't that be an improvement over the existing situation where there simply is no forum?

Mr. BARDEN. Well, Mr. Chairman, I think there is a forum now. There have been complaints about delays in the Treasury process under the 1921 act. Frankly, some of them have been well founded, but largely because of what has been until now a serious lack of resources. That problem is in the process of being corrected. Authorization was sought and obtained for 130 new positions. That was sought and obtained by the Treasury Department. Commerce will inherit those. So, totally we will have the number of people devoted to this area expanded from something less to 100 to well over 250, actually.

In point of fact, in any actions brought under the 1916 act and they have been very few, the judicial process is incredibly slow. The case that I mentioned which I believe involved questions of television sets from Japan has been going on for several years.

Presently, under the Antidumping Act, meaningful relief comes in the average case roughly 7 months after a petition is filed. By meaningful relief I mean a tentative determination as to whether dumping is occurring and if that is affirmative, then appraisement of entries from that dumping is occurring, that injury is occurring, or is likely to occur, then dumping duties are assessed or are assessable on merchandise entered from that date of the tentative determination.

Under the new law, that period will be compressed to be something a little bit under 6 months from the date of filing of a petition.

I think that is very meaningful, very timely relief, given the great complexity of trying to determine whether in fact dumping is occurring and under any law an attempt to make a fair judgment cannot be made in significantly less time.

I believe, frankly, that meaningful relief necessarily will come more quickly under the 1921 act and its successor than it ever could under a purely antitrust provision knowing the delays and the time that is consumed in typical antitrust litigation.

As I said in my statement, I think it is worth giving this new law a chance to see how it works. The domestic industry as that law was drafted, and it was drafted through a genuinely joint process with input from many sectors, the domestic industry had a great deal of influence on what went into that law. Many of their concerns are directly reflected in the new law.

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Senator MATHIAS. Well, the record will be written on that.

Mr. BARDEN. It certainly will.

Senator MATHIAS. Speaking of the record, could you tell us how much the Treasury has collected in fines under the antidumping laws since their original enactment, both the 1916 and 1921 act?

Mr. BARDEN. Well, to repeat one point, Treasury has never collected anything under the 1916 act, because we do not administer that.

Senator MATHIAS. You get what is collected, though.

Mr. BARDEN. Not in a way that we could identify. I think you would have to ask the Department of Justice. I don't—to the best of my knowledge, the Department of Justice, the U.S. Government has never brought an action under the 1916 act. But, again, they should be asked about that.

I do not know and I frankly have no way of knowing, nor do I think it would be ever possible to give any answer to the question of how much has been collected in dumping duties since 1921.

Senator MATHIAS. Would you make that inquiry and advise the committee?

Mr. BARDEN. I will make the inquiry. I will see that as much information as we have is submitted to you.[1]

Senator MATHIAS. Thank you very much, Mr. Barden.

Mr. BARDEN. Thank you, Mr. Chairman.

Senator MATHIAS. Senator Thurmond, would you like to make a statement or address questions to Mr. Barden?

Senator THURMOND. Thank you.

In a hearing of this subcommittee held May 12, 1977, I asked questions pertaining to oversight of antitrust enforcement at page 39, of the transcript. It went as follows:

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Bergsten, I noticed in your statement that you refer to steel and to automobiles. I believe you covered shoes this morning. I want to ask you about textiles.

I believe the record shows that textile and apparel exports in 1976 amounted to $2.5 billion, and the imports amounts to $5.8 billion—more than twice as much.

I am just wondering how our textile industry is going to stay in business when such a condition as that exists for very long, especially in view of the fact that the wage of textile workers in this country is about $4 per hour, whereas in many other countries that send imports in here it ranges from $.38 to $.74.

This is a very serious problem.

In 1968, I was on the Commerce Committee and a member of the Textile Subcommittee of which Senator Pastore was chairman. We held hearings in New Hampshire and Massachusetts and Rhode Island and Washington and North and South Carolina. Lots of mills just closed down because of the imports. It looks like we have the same situation again unless some steps are taken to prevent this undue quantity of textile imports from coming into this country.

Textile and apparel imports provide more jobs for American workers than any other industry. It is number one.

The Defense Department says that textiles ranked second to steel during the war. If textiles are that important, it is essential that we not become dependent on foreign countries for our textiles.

If our mills are forced out of business, then we will be dependent upon foreign countries.

Have you had a chance to look into this field or not? If you haven't I wish you would do so, because we feel this is extremely important.

Mr. BERGSTEN. I have, Senator. I agree it is very important.

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[1] The Treasury Department has notified the subcommittee it is not able to provide or collect the statistics on dumping duties assessed since 1921.

Let me comment in two ways: In my testimony, I stress the importance of imports in industries which are highly concentrated. In those industries, it may be a necessary source of competitive pressure.

I singled out two industries—steel and autos—where there are not a large number of U.S. firms.

That is quite a different situation from both shoes and textiles, where there are large numbers of domestic firms and a lot of competition within the industry. The point I made in my testimony about the importance of competition from abroad is not the same in shoes and textiles as it is in autos and steel.

The second response is on the broader point about textile imports.

As you well know, because you have been active in that policy throughout its evolution, there are now comprehensive import restraints which the United States has negotiated with all foreign supply countries of textiles to the United States, which regulate within very tight limits on a category-by-category basis the amount of textiles and textile products which they can sell to us.

As a result of that, the market penetration of textile imports has been restrained very sharply, dating back originally to the 1950's when the first bilaterals were struck and particularly now over the last 2 or 3 years where the Multifiber Agreement has provided comprehensive restraints on an international basis, covering not only cotton but woolen and manmade fiber textiles.

So we do have, in place, a national policy to deal with the questions you raised—comprehensive restraints, product by product, country by country.

President Carter reaffirmed his support for that program during the campaign and has reaffirmed it again since he has been President. All of us within the administration have been working actively to insure the effectiveness of that program and to negotiate within the multilateral framework bilateral restraint agreements with the individual producing countries to deal with the kinds of problems you raised.

So it is recognized as an important problem and one where an import program, on a comprehensive basis, does, in fact, exist.

Senator THURMOND. I believe the first agreement was the Cotton Agreement, entered into during President Kennedy's administration. This was very helpful.

Then we had the Multilateral Agreement. That agreement expires in December of this year—1977. When that agreement is negotiated again, it is my thinking that there should be a modification. Six percent a year, I believe, was the amount of the increase provided in that agreement.

We don't think the increase of imports should be a greater percent than the percent of growth of the industry in this country.

In other words, we think the imports should be on the same basis as the growth in the industry. That makes sense doesn't it?

Mr. BERGSTEN. You are quite right in saying that the Multifiber Agreement is now in the process of being renegotiated. It runs out at the end of this year.

The Administration view is that the Multifiber International agreement is a very valuable one, because it provides a comprehensive framework within which to deal with the issues that you have raised. And, therefore, it is of great importance to the United States to be able to extend that agreement for another period of time beyond its expiration at the end of this year.

The 6 percent which you mentioned is the rule of thumb in the agreement, but it is not mandatory that it be included in all of the bilateral agreements that are negotiated under the multilateral framework.

In cases where there is market penetration that is excessive or costs to our domestic economy that go beyond the normal workings of the textile agreement, the Administration is certainly prepared to negotiate lower growth rates in particular products with particular supplying countries.

We do feel that to try to reduce the 6 percent figure in the agreement as a whole would risk the extension of the whole multilateral framework.

Supplying countries, and countries which export textile products to us and other industrial countries around the world, have already felt that the 6 percent from their standpoint is very low. Clearly, it does restrain the amount of increased production that they could achieve.

If we shot for a change in that target figure, it is our fear that we might lose the whole international framework. In that case, we fear it would be much harder to maintain the kind of overall market regulation that is essential.

So our position has been to seek an extension of the multilateral agreement with its current terms in order to best assure a continued multilateral framework

to avoid market disruption from textile trade. And within that framework to negotiate tighter ceilings on individual items in our bilateral restraint agreements where that seems to be warranted.

Senator THURMOND. I hope you will keep this in mind, because this is extremely important.

We feel it would be only fair to limit the import increase to the growth increase in the industry in this country.

We think that this agreement should be enforced to a great extent. My information is that Red China has not been adhering; that we have allowed them a little latitude to send in greater amounts. Would you look into that also?

Mr. BERGSTEN. Yes.

Senator THURMOND. We feel that Red China should be restricted to the agreement and not allowed to send in large amounts.

Thank you, Mr. Chairman.

Senator KENNEDY. We appreciate your sharing your views with us, Mr. Bergsten. We look forward to working with you. Obviously, we have a lot of common areas of interest.

Mr. BERGSTEN. Thank you, Mr. Chairman.

Senator THURMOND [continuing]. Mr. Chairman, I have a few questions for some of the witnesses. If they could be propounded by counsel or answered for the record, either one.

Senator MATHIAS. Thank you very much, Senator Thurmond.

Senator THURMOND. I have an Armed Services Committee meeting. If you will excuse me, I will go back to that meeting.

Senator MATHIAS. Your questions will be propounded either in writing or by counsel.

Senator THURMOND. Thank you.

[Question of Senator Thurmond and response of Mr. Barden appear in the appendix.]

Senator MATHIAS. Does counsel have any questions of Mr. Barden?

[No response.]

Senator MATHIAS. Thank you very much.

Our next witness is Mr. Laird D. Patterson, of Bethlehem Steel.

STATEMENT OF LAIRD D. PATTERSON, ACCOMPANIED BY ROGER ROBINSON, LAW DEPARTMENT, BETHLEHEM STEEL CORP.

Mr. PATTERSON. Good morning. I am accompanied today by Roger Robinson, my colleague in Bethlehem's law department.

A substantial portion of my practice is devoted to the analysis and application of legal remedies available to my client in response to unfair foreign competition in the domestic steel market. I appreciate this opportunity to testify in support of S. 938.

In my opinion, S. 938 is a constructive proposal to strengthen the effectiveness of a statute that fills an important gap in the spectrum of legal remedies available to redress injury from dumping.

The experience of the domestic steel market in the last two decades provides clear and compelling evidence that trade remedies as they presently exist have simply not provided an effective deterrent to dumping. In periods of slack demand the United States has been the major open market for the disposal of excess world steel capacity, and foreign steel producers have seized the opportunity to maintain production and employment levels by selling in the American market at prices which are below their home market prices and below their full cost of production. This has had a profound and pervasive impact on

the domestic industry, affecting production volume, earnings growth, employment and ability to modernize.

In my opinion, the lack of effective deterrents to the dumping of foreign steel in the Nation's market continues to be a significant impediment to the commitment of capital spending needed to maintain a modern steel industry in the United States.

There are, of course, a variety of reasons for the ineffectiveness of the existing antidumping remedies as a deterrent to dumping, not the least of which has been the acknowledged failure of responsible Government departments and agencies to vigorously perform the duties delegated to them.

We are hopeful that the Trade Agreements Act of 1979 and the recent reorganization of trade responsibilities within the Federal Government will improve that unfortunate situation.

Of really greater significance, however, is the simple fact that the commonly used Antidumping Act of 1921 provides only prospective relief designed to prevent the continuance of the practice.

That act does not provide any economic disincentive to dumping in the form of fines or civil liability for damages resulting from illegal and predatory practices.

In addition, in the case of steel, it is relatively easy for a foreign producer to shift his product mix when confronted with prospective dumping duties applied to a specific product.

The Revenue Act of 1916, does authorize private civil treble damage actions against persons who "commonly and systematically" import products at "substantial" dumping margins if such actions are taken with the requisite intent to injure, destroy or prevent the establishment of a domestic industry or restrain or monopolize commerce in the Nation.

Until revived in the still pending case in Philadelphia against the Japanese color television manufacturers, this act has been rarely invoked.

The underutilization of the 1916 act is probably a consequence of perceived problems with the language of the statute and perceived impediments to effective discovery.

The Japanese TV case has demonstrated that the 1916 act should be an effective deterrent to dumping.

However, I suspect that the long procedural history of that case may have confirmed in many peoples' minds the perception that the 1916 act, in its present form, is not a particularly efficient remedy for redress of dumping grievances. I think it is now in its sixth judge. Two judges died, three were elevated to the circuit court. As a result, it has had a very long procedural history. I think people look at that and they say, "Gee. It has taken them 10 years to get to trial in that case," without realizing some of the unique aspects of the procedural history.

So, the perception resulting from that case is that it still is not a very effective or efficient remedy.

The amendment of the 1916 act as proposed in S. 988 would clearly enhance the effectiveness of that 1916 act both objectively and as a perceived deterrent to dumping.

First, it would correct a longstanding legislative oversight by declaring the 1916 act to be one of the antitrust laws of the United States.

As such, the amendment would provide both the Government and injured persons with the remedy of injunctive relief not now available, prescribe a statute of limitations to be tolled for injured persons during Government proceedings and further encourage private enforcement by making Government judgments and decrees prima facie evidence of violations in private suits.

I might add here that the latter may be an illusory advantage so long as the international section of the Antitrust Division continues to concentrate its efforts on orchestrating a campaign of threats of antitrust enforcement against domestic companies who choose to enforce their lawful trade remedies rather than looking at the harm done to these industries by the predatory and anticompetitive dumping practices of some foreign manufacturers.

The offense of dumping is a flagrant attack on competition and can be as destructive as any well-recognized violation of the Sherman or Clayton Acts. The 1916 act was intended to be part of the antitrust laws, condemning as it does a predatory practice injurious to competition and providing a criminal sanction as well as civil redress.

There is compelling justification for this amendment both in the legislative history of the 1916 act and in the need for more effective remedies against anticompetitive dumping practices.

Second, under S. 938 the nature of the required proof of intent would be clarified. The willful importation and sale of foreign merchandise at substantially less than fair value would be actionable if objectively defined tests of the effect of such conduct are satisfied.

The plaintiff would need to prove the state of mind of the offending importer only as to the importer's knowledge that he is violating the antidumping laws by a substantial margin and would thereafter be able to sustain its burden of proof as to the effect of such conduct by objective evidence.

I submit that in many cases this a much more viable proposition than sustaining a burden of proving specific intent on the part of the importer to injure a domestic industry or restrain or monopolize trade in U.S. commerce.

Where foreign manufacturers willfully violate the Nation's antidumping laws by substantial margins, they are hardly deserving of being insulated from appropriate redress of grievances by an unnecessarily difficult burden of proof.

I am concerned, however, that the proposed requirement that the dumping "necessarily and directly" have the required or injurious or anticompetitive effect is subject to abuse in that the test is arguably not tied to normal or actual market conditions.

An importer clearly should be precluded from arguing that the sale of a product at substantial dumping margins would not injure the domestic industry under certain theoretical market conditions not in effect at the time of the sale.

The substitution of the words, "as a natural or probable result thereof," for the words "necessarily and directly" in line 20, on page 2, of S. 938 would eliminate this possibility of abuse and would provide a more appropriate test consistent with the antitrust laws.

Finally, S. 938 would significantly clarify and facilitate the availability of broad discovery and provide a strong and effective incentive for importers to comply with discovery orders by giving the court the

discretionary power to enjoin further importation of the articles in question by the defaulting party.

These amendments respond to, and are needed to overcome, the perception that necessary discovery under the 1916 act may be difficult to obtain.

In summary, I believe that S. 938 would clearly enhance the effectiveness of the 1916 act. The bill is a modest and responsible proposal. It is not a protectionist's panacea. Nor would it be expected to cause a major shift in normal antidumping enforcement from the 1921 act to the 1916 act.

However, it is a sound and constructive proposal to improve the existing law and thereby strengthen the remedies for and deterrents to dumping. As such, it is a bill worthy of enactment.

Senator MATHIAS. Thank you very much, Mr. Patterson. I would agree with your expectation that it would not cause a major shift in normal antidumping enforcement. But, I think it would give American manufacturers, American business generally, greater confidence in the enforcement of the antidumping laws because the initiative will be theirs and would not depend upon the action or inaction of what are viewed as buresucratic agents within the Federal Government. Is that your feeling?

Mr. PATTERSON. I agree. I think it is appropriate that the primary and most commonly used remedies for antidumping be the 1921 act.

But the presence of an effective and enforceable antitrust remedy for dumping would provide a much stronger disincentive for dumping.

Senator MATHIAS. It is really the same gun, it is a different trigger.

Mr. PATTERSON. Right. Exactly.

Senator MATHIAS. Yes.

Mr. PATTERSON. The combination of the two could be very effective.

Senator MATHIAS. You recommend that we amend the language of the bill to change the proposed requirement that the dumping necessarily and directly have the required injurious or anticompetitive effect. You would prefer a test "as a natural or probable result thereof," because the test is not tied to normal or to actual market conditions.

Would you like to explain that in a little more detail?

Mr. PATTERSON. I am just concerned that a skillful advocate could make an argument that "necessarily," implies "necessarily" under all circumstances. I don't think that is an appropriate argument or a correct argument, but I think you could anticipate and head off that kind of an argument by a more typical language for the antitrust statutes. "Necessarily" is a very strong word. I am not sure I know what it should mean in that context.

Senator MATHIAS. Mr. Barden, in his testimony, which I believe you heard, discussed the difficulty of getting an equitable comparison of prices and making certain factual judgments. He said that importers have no way of knowing whether or not the goods they import are being dumped. Do you see a role for the U.S. Government in helping importers to determine if dumping is going on?

Could the Government maintain the kind of bilateral price monitoring to help the importer to know he is dumping if in fact the importer is that innocent of that knowledge?

Mr. PATTERSON. I would have to respectfully disagree with Mr. Barden's statement. There are two tests of dumping right now. One

is sales at the below-home-market prices, the other sales at below cost of production.

I find it very difficult to believe that importers or foreign manufacturers don't realize that they are selling products in this market at below either of those prices.

In response to your question, I think you would launch such a broad administrative requirement that it would be practically impossible to carry out if you were to cover all product home-market prices of all products imported into the U.S. market.

Senator MATHIAS. You think that would be a burden on the Government that the Government could not sustain?

Mr. PATTERSON. I think so. I think it would be a lot easier for the foreign manufacturers and importers to appreciate that their prices are in fact below home-market prices.

Senator MATHIAS. Of course, that would really be tested by the provisions of this bill which will be tested in the courtrooms.

Senator PATTERSON. Under your bill as proposed, they would have to know and appreciate that they were in fact selling at substantially below cost of their home-market prices.

Senator MATHIAS. So it really just puts them in the posture of anybody else in the United States who is assumed to know what the law is and to be prepared to comply with it.

Mr. PATTERSON. I believe so, Senator.

Senator MATHIAS. Right.

Does counsel have any questions?

Mr. CHUMBRIS. I have just one question. We will submit several questions in writing to you, but back in the early 1960's, a Scripps-Howard writer was covering the country inquiring in areas where we had steel factories and showed where the American workers were unemployed and there was a big sign in the picture showing "imported steel," and this was in the area of 1961 and 1962, when there was a serious problem fighting steel imports.

Does this issue go as far back as that or is this more recent?

Mr. PATTERSON. I think——

Mr. CHUMBRIS. The issue of this bill?

Mr. PATTERSON. The issue of this bill?

Mr. CHUMBRIS. Yes.

Mr. PATTERSON. It can go back as far as that. The history of the import problem in steel goes back to 1959. Since then the industry I think has sort of geared up to various stages of injury and other political solutions have intervened to prevent strict enforcement of the existing statutes.

Mr. CHUMBRIS. One other point. Do you have any suggestions of perhaps making this bill even stronger to correct the problem that you present to us?

Do you have any suggested amendments?

Mr. PATTERSON. Well, the bill, other than what I have suggested in my testimony, the only other possibility I think would be simply to make the bill provide a straight treble damage action for dumping without the predatory attempt requirement which presently exists.

Mr. CHUMBRIS. Thank you.

Mr. PATTERSON. Whether such a bill could generate the necessary support, I don't know.

Mr. CHUMBRIS. Thank you, Mr. Chairman.

Mr. COOPER. Mr. Patterson, as I understand your testimony you comment favorably on the removable that S. 938 achieved of the specific intent requirement that exists under existing law.

Do you know of any other antitrust law now that has a similar specific intent requirement?

Mr. PATTERSON. I——

Mr. COOPER. I am thinking in terms of a monopolization case under section 2, of the Sherman Act.

Mr. PATTERSON. Yes, as Roger points out, you infer intent from facts proven at trial.

Mr. COOPER. In other words, under existing law the intent requirement under section 2 is less onerous than under the 1916 act?

Mr. PATTERSON. I believe it is, yes.

Mr. COOPER. So, S. 938 would just make the intent requirement more consistent with the existing antitrust laws?

Mr. PATTERSON. Yes.

Mr. COOPER. Thank you.

Senator MATHIAS. Any further questions?

Mr. CHUMBRIS. No. Thank you, Mr. Chairman.

Senator MATHIAS. Mr. Patterson, did you read the Washington Post this morning?

Mr. PATTERSON. Parts of it.

Senator MATHIAS. Perhaps I should be more specific. Did you read Mr. Kraft's column this morning?

Mr. PATTERSON. That much I did not have time to do.

Senator MATHIAS. It relates to the steel industry of this country. It is very interesting. It is not without some relevance to this hearing today.

Mr. CHUMBRIS. Why don't you put it in the record, Mr. Chairman.

Senator MATHIAS. I think we should. We will include it for the record, without objection.

Thank you very much, Mr. Patterson.

Mr. PATTERSON. Thank you, Senator.

[Questions of Senator Thurmond and responses of Mr. Patterson appear in the appendix.]

[The prepared statement of Mr. Patterson follows:]

PREPARED STATEMENT OF LAIRD D. PATTERSON

My name is Laird D. Patterson. I am a General Attorney in the Law Department of Bethlehem Steel Corporation. A substantial portion of my practice is devoted to the analysis and application of legal remedies available to my client in response to unfair foreign competition in the domestic steel market. I appreciate this opportunity to testify in support of S. 938.

In my opinion S. 938 is a constructive proposal to strengthen the effectiveness of a statute that fills an important gap in the spectrum of legal remedies available to redress injury from dumping.

The experience of the domestic steel market in the last two decades provides clear and compelling evidence that trade remedies as they presently exist have simply not provided an effective deterrent to dumping. In period of slack demand the United States has been the major open market for the disposal of excess world steel capacity, and foreign steel producers have seized the opportunity to maintain production and employment levels by selling in the American market at prices which are below their home market prices and below their full cost of production. This has had a profound and pervasive impact on the domestic industry, affecting production volume, earnings growth, employment and ability

to modernise. A 1978 study performed by Putnam, Hayes & Bartlett, Inc. for the American Iron and Steel Institute concluded that "(a)s a result of reduced shipments and lower realized prices attributable directly to dumping, injury to the domestic steel industry during the 1976–1977 period was in excess of $4 billion". The lack of effective deterrents to the dumping of foreign steel in the U.S. market continues to be a significant impediment to the commitment of capital spending needed to maintain a modern steel industry in the United States.

There are, of course, a variety of reasons for the ineffectiveness of the existing antidumping remedies as a deterrent to dumping, not the least of which has been the acknowledged failure of responsible government departments and agencies to vigorously perform the duties delegated to them. We are hopeful that the Trade Agreements Act of 1979 and the recent reorganization of trade responsibilities within the Federal Government will improve that unfortunate situation.

Of much greater significance, however, is the simple fact that the commonly used Antidumping Act of 1921 provides only prospective relief designed to prevent the continuance of the practice. That act does not provide any economic disincentive to dumping in the form of fines or civil liability for damages resulting from the illegal practices. In addition, in the case of steel, it is relatively easy for a foreign producer to shift his export product mix when prospective dumping duties are levied against a specific product.

The Revenue Act of 1916, which S. 988 proposes to amend, does authorize private civil treble damage actions against persons who "commonly and systematically" import products at "substantial" dumping margins if such actions are taken with the requisite intent to injure, destroy or prevent the establishment of a domestic industry or restrain or monopolize commerce in the U.S. Until revived in the still pending case in Philadelphia against the Japanese color television manufacturers, this act had been rarely invoked. The underutilization of the 1916 Act is probably a consequence of perceived problems with the language of the Statute and perceived impediments to effective discovery. The Japanese TV case has demonstrated that the 1916 Act should be an effective deterrent to dumping. However, I suspect that the long procedural history of that case may have confirmed in many people's minds the perception that the 1916 Act, in its present form, is not a particularly efficient remedy for redress of dumping grievances.

The amendment of the 1916 Act as proposed in S. 988 would clearly enhance the effectiveness of that statute both objectively and as a perceived deterrent to dumping. First, S. 988 would correct a longstanding legislative oversight by declaring the 1916 Act to be one of the antitrust laws of the United States as defined in Section 1 of the Clayton Act (15 U.S.C. Section 12) and within the scope of the important remedial provisions of Section 4, 4B, 5, 15 and 16 of the Clayton Act, as amended (15 U.S.C. Sections 15, 15b, 16, 25 and 26). As such, the amendment would provide both the Government and injured persons with the remedy of injunctive relief not now available, prescribe a statute of limitations to be tolled for injured persons during Government proceedings and further encourage private enforcement by making Government judgments and decrees *prima facie* evidence of violations in private suits.

The offense of dumping is a flagrant attack on competition and can be as destructive as any well-recognized violation of the Sherman or Clayton Acts. It appears that the 1916 Act was originally intended to be part of the antitrust laws, condemning as it does a predatory practice injurious to competition and providing a criminal sanction as well as civil redress.

Furthermore, the restraint of trade and monopolization language and the treble damage provisions of the 1916 Act were copied from the original Sherman Act two years after the passage of the original Clayton Act. There is, therefore, a compelling justification for this amendment both in the legislative history of the 1916 Act and in the need for more effective remedies against anticompetitive dumping practices.

Secondly, under S. 988 the nature of the required proof of intent would be clarified. The willful importation and sale of foreign merchandise at subsequently less than fair value would be actionable if objectively defined tests of the effect of such conduct are satisfied. The plaintiff would need to prove the state of mind of the offending importer only as to the importer's knowledge that he is violating the antidumping laws by a substantial margin and would thereafter be able to sustain its burden of proof as to the effect of such conduct by objective evidence. This is a much more viable proposition than sustaining a burden of proving *specific* intent on the part of the importer to injure a domestic

industry or to restrain or monopolize trade in U.S. commerce. Where foreign manufacturers willfully violate the U.S. Antidumping laws by substantial margins, they are hardly deserving of being insulated from appropriate redress of grievances by an unnecessarily difficult burden of proof.

I am concerned, however, that the proposed requirement that the dumping "necessarily and directly" have the required injurious or anticompetitive effect is subject to abuse in that the test arguably is not tied to normal or actual market conditions. An importer clearly should be precluded from arguing that the sale of a product at substantial dumping margins would not injure the domestic industry under certain theoretical market conditions not in effect at the time of the sale. The substitution of the words ", as a natural or probable result thereof," for the words "necessarily and directly" in line 20 on page 2 of S. 988 would eliminate this possibility of abuse and would provide a more appropriate test consistent with the Antitrust Laws.

Finally, S. 988 would significantly clarify and facilitate the availability of broad discovery and provide a strong and effective incentive for importers to comply with discovery orders by giving the court the discretionary power to enjoin further importation of the articles in question by the defaulting party. These amendments respond to, and are needed to overcome, the perception that necessary discovery under the 1916 Act may be difficult to obtain.

In summary, I believe that S. 938 would clearly enhance the effectiveness of the 1916 Act. The bill is a modest and responsible proposal. It is not a protectionist's panacea. Nor would it be expected to cause a major shift in normal antidumping enforcement from the 1921 Act to the 1916 Act. However, it is a sound and constructive proposal to improve the existing law and thereby strengthen the remedies for and deterrents to dumping. As such, it is a bill worthy of enactment.

Senator MATHIAS. Our next witnesses will be Mr. Paul Beispel, who I understand will be accompanied by Mr. David Palmeter.

STATEMENTS OF PAUL BEISPEL, AND DAVID PALMETER, AMERICAN IMPORTERS ASSOCIATION

Mr. BEISPEL. Mr. Chairman, members of the committee, my name is Paul Beispel. I am vice president of the American African Export Co. of New York City.

Our company, unlike our name, is an importer of footwear from Europe, Mexico, the Far East. We sell our footwear nationally to the volume trade throughout the United States.

I appear here in my capacity as vice president of the American Importers Association, known as the AIA, with offices at 11 West 42d Street, in New York City.

I am accompanied by Mr. David Palmeter of the law firm of Daniels, Holihand & Palmeter.

The American Importers Association is a nonprofit organization, formed in 1921, to represent the common interests of the U.S. importing community.

As the only association of national scope not limited to specific commodities or product lines, AIA is a recognized spokesman for importers throughout the Nation.

At present, AIA is composed of over 1,300 American firms directly involved with the importation and distribution of goods produced outside the United States. Its membership is primarily importers, wholesalers, retailers and manufacturers and also includes custom brokers, attorneys, banks and others connected with foreign trade.

AIA members range in size from the small import companies to some of the largest American corporations. All member firms must be incorporated in the United States or be controlled by American citizens.

AIA welcomes this opportunity to present our views on Senate bill No. 938, and our comments will be presented by Mr. Palmeter.

Thank you.

Mr. PALMETER. Mr. Chairman, I am David Palmeter, of the law firm of Daniels, Holihan & Palmeter in Washington.

The American Importers Association is opposed to S. 938, essentially for two reasons. First, we believe that the bill would unfairly discriminate against imports and importers and exporters, and penalizing conduct only if it occurs in the import trade as opposed to interstate commerce in general.

Second, and perhaps more important from our point of view, we believe that it would perpetuate and expand statutory and regulatory unfairness already imposed on imports by our Nation's laws that ostensibly aim to regulate unfair competition.

These include the already mentioned Antidumping Act of 1921.

It is axiomatic that imports and importers and exporters are subject to the antitrust laws of the United States. Our understanding is that violations of these laws of the import trade are neither more nor less violation because the goods involved are foreign rather than domestic origin.

We seek no exemption from the antitrust laws for importers or for imported goods. We do assert, however, that there is no need for any difference in the application of the antitrust laws to goods of U.S. origin.

Thus, in our view, there is no need for bills such as S. 938, nor for the statute that it would amend, nor for other statutes that regulate competition of imports simply because they are imported in a manner that differs from regulations on domestic goods.

In our view, such discriminatory statutes amount to a violation of the international obligations of the United States, particularly the general agreement on tariffs and trade and the international antidumping code which we believe preempts the field and is the international obligation of the United States.

In this regard, Mr. Chairman, we would submit respectfully for your consideration the proposition that the statement, the opening remarks that the Nation could hold its own in foreign trade if the foreigners play by the rules.

Well, we submit that S. 938 would violate the existing rules by imposing penalties that are not sanctioned by international agreement.

But there is an even more important reason for AIA's opposition to this bill. That reason is that this bill would perpetuate and expand, in our view, already existing unfair statutory burdens imposed on imports by the antidumping laws of the United States.

We submit that any fair impartial analysis, one that we really don't think has ever occurred or at least has not occurred in recent years in this country, would deem these laws anticompetitive, prorestrictive, protectionist, unfair in their actual application to international trade.

Conduct that is permitted, perhaps even lauded in domestic commerce, in interstate commerce in the United States is condemned by the antidumping laws solely because it is international in nature.

In recent years, of course, it has been the 1921 act which has been the law of major impact.

For many of the problems that exist in the 1921 act will be carried over into the 1916 act as we understand it to be amended by this bill.

For example, the operative section 3(a), of S. 938 would impose severe penalties, including $50,000 fines and possible treble damages on any person importing or assisting in importing any articles at a price substantially less than the actual market value or wholesale price of such article at the time of the importation into the United States in the principal markets of the country of production.

The concepts of actual market value or wholesale price in this context seem to us very close to the concepts of fair value, and foreign market value as those terms are used in the 1921 act.

The wholesale price of the article in the country of production in a typical case would be the foreign exporter's price for the product to a wholesaler or a distributor in its home market.

A U.S. importer would be subject to the severe penalties of S. 938 if he bought or sold imported goods at a price below that charged by his foreign supplier to another buyer in the foreign supplier's home market. But how is the U.S. importer to know what that price is?

This committee need not be told that there could be serious antitrust implications should Mr. Beispel and other American importers sit down with their foreign suppliers, discuss that supplier's crisis to others, or in order to ascertain market value as that term is used in Custom's jurisprudence, to discuss the prices of other parties as well.

But, putting these problems aside for the moment, what guarantee has the importer that the foreign supplier would care to disclose such figures or if he purported to disclose them, would do so accurately.

Moreover, how is the importer to make the adjustments called for by S. 938 for freight for duty other changes and expenses that may be attended to differences in merchandise, quality, quantities or even such things as metric versus our own measuring systems here.

In the 1971 Williams' Commission report the Treasury Department, in explaining the protective and restrictive effect of the Antidumping Act and its regulations, literally crowed about the fact that, and this is a quote. "An exporter may not be entirely certain that he has in fact eliminated his dumping margins," and in these circumstances, even if the exporter feels that he has done so, "the importer can never be sure that this is true."

That quotation and that article is discussing among other things the restrictive effect on international trade and the protective effect of merely having a law on the books that no one can know if he is complying or not.

What kind of a competition policy do we have in this country when administrators point with pride to the fact that fear of unknowing, innocent violations, can restrict trade and competition.

We submit that such laws themselves are unfair and in no place in the statutory scheme that seeks to promote free, open and fair commerce.

We have other serious problems with the language of S. 938. For example, the phrase "At the time of their importation in the United States." Assume that the importer asks the foreign exporter about the wholesale price of the articles at the time the importer makes his purchase, that the exporter accurately informs the importer of that

price, and the price to the United States is established in compliance with the provisions of S. 938. Subsequently the goods are exported. And, after a long ocean voyage arrive in the United States on a date which becomes under the terms of the law, the time of their importation.

But this would be weeks, Mr. Belspel tells me in the case of his company, months after the price was agreed upon by importe and exporter.

What happens if the exporter has altered its home market price since that time and the importer knows it?

Why should an American importer be threatened with the penalties of S. 938 because a foreign exporter changed its price to a third party and in the time since the importer made a contract for the goods and took delivery.

The pitfalls of such a standards are many. For example, we draw the committee's attention to current practice under the 1921 law. But the U.S. importer is a subsidiary of a foreign exporter, and presumably then has access to that exporter's information.

It will frequently sell, say steel products, out of a warehouse in this country. It also may act as agent for its parent in obtaining orders which U.S. purchasers take directly from the parent company.

Or, as frequently will happen, goods will be exported from the parent to the U.S. subsidiary and will be sold in transit.

If a U.S. importer of this nature were to sell on the same day to the same customer, the same quantities, the same price, that importer will probably be violating the terms of the Antidumping Act of 1921, the same price, the same quantity and the same day and same customers is unfair because this price under the 1921 law is compared to different home market prices at different times depending upon whether the goods are sold ex-warehouse or presold prior to shipment or are sold on the water and it is an almost impossibility for the exporter and importer, at the time of these transactions, to know which, when the dates would be.

These circumstances, nonetheless, do result in exporters being branded unfair competitors and U.S. importers being subjected to antidumping duties because the importer lacks the ability to anticipate this unfairness.

S. 938, in our view, would increase that importer's risk, with the possibility of a fine, to say nothing of treble damages.

We agree with Mr. Barden's remarks there certainly is a problem in the administration of the antidumping laws in making equitable price comparisons under these laws.

Although in the scheme of regulations that can produce such results justify in our view the labels we have used and we realize they are serious, "anticompetitive, per restrictive, protectionist and unfair."

What should be deemed unfair about these laws in our view is not the conduct that they regulate, but the laws themselves.

We do not, therefore, believe the committee should report favorably on S. 938. We believe it is the wrong way to go. Rather, we ask this committee, with its expertise in matters of antitrust and competition, engage in a thorough study of the impact of the application of the U.S. antidumping laws on competition in this country and should ask anew what international economic conduct it is that our laws regulate and

should ask whether this economic conduct requires regulation at all, and if it is determined that this conduct does require regulation, whether our present form of regulation is fair and reasonable.

These are fundamental questions that need the attention of the Congress. In recent years there has been much rhetoric about dumping and unfair competition. Of course, everyone is against unfair practices. Everyone is against such things as dumping as a pejorative term.

We submit that there has not been any meaningful look to what is meant by these terms under the outmoded and unexamined premises of the antidumping laws of the United States.

AIA asks that this committee and the Congress examine those premises. They are confident that if you do so you would not report out S. 938, but rather would be considering bills that would foster and promote competition in the U.S. market.

Thank you very much.

Senator MATHIAS. Well, thank you, sir. I think you make an interesting case. Going back to one of your basic statements which relates to the whole concept of international trade and to your view of the essential identity between international trade and interstate trade.

I am just wondering if you have followed the history of the dollar on international currency markets in the last couple of years?

Mr. PALMETER. I know it has been moving rapidly up and down, Senator. I really can't say I follow it with any expertise at all. I am very naive on currency.

Senator MATHIAS. One of the reasons it has been moving rapidly up and down, largely down, has been the fact that whether we like it or not or whether it is a good way for the world to do business, nations keep books on a national basis. Maybe we ought to have a more enlightened kind of global economy. Maybe we will some day. But for the moment, we don't. The fact that the United States has an adverse balance of trade is certainly one of several factors which is affecting the current condition of the dollar in international money markets. Wouldn't you agree?

Mr. PALMETER. Yes; I would, Senator.

Senator MATHIAS. Whether we are in the best of all worlds or not, the problems of imports and exports between nations are of a different category of concern than internal domestic trade.

Mr. PALMETER. I would agree with that, Senator. Where I was having my difficulty with the discrimination as I call it between the import and domestic trade is in the application of what boiled down to in some cases the criminal sanctions whether than regulatory matters.

I can't really speak for the American Importers Association on this point, but as an individual I can certainly recognize the United States has had serious trade problems, trade balance problems over the years. Recently, in particular, these are exacerbated by the oil situation.

The dollar has moved down in relation to many currencies, although I understand it is picking up in relation to the Japanese yen, but they also have their oil problems.

I wonder if an attempt to regulate that, an attempt to ameliorate the impact of the international currency problems and international trade problems should be done in a context of unfair trade statute.

Perhaps Mr. Beispel's company should not be permitted to bring in as many shoes as it brings in, but that—to say that is not to say that

he should be subject to treble damages and $50,000 fines, and possible indictment because his supplier changed his prices between the date of contract date and date of delivery and that is what we are questioning.

Senator MATHIAS. Then your argument really is with the whole concept of the antidumping laws, and not with simply adjusting the means by which we trigger?

Mr. PALMETER. Very much so, Senator. For example, I understand Mr. Fisher can speak for himself, but at a later date will be addressing the problems of importations from nonmarket economies.

How would S. 398, in talking of wholesale prices, in the Soviet Union, for example—these are all fundamentally important questions that must be addressed by this country.

I am not denying that international trade isn't important and a matter to be considered by the Congress. I would submit that this bill does not really address it in the way it needs to be addressed.

Senator MATHIAS. Well now, you state that the anti-dumping laws prohibit conduct on the international level that is permitted domestically.

Isn't it true that the antitrust laws prohibit predatory pricing as an attempt to monopolize it domestically?

Mr. PALMETER. Very much so, Senator, and we certainly would not exclude imports from that. But I wonder: For example, take a hypothetical company, let's say Bethlehem Steel, and we decided arbitrarily that at some point the United States became an international border, say, maybe the Mississippi River or some line of an east and west axis. If we were to examine that company's sales in those two markets we have established and netted out all such freight and quantity differentials and so on and took it back and in one of those markets took a weighted average and then, on the other side of the Mississippi, compared each individual sale to that weighted average, I would submit that they probably would be dumping under the terms of the 1921 act.

I think we have a domestic price competition statute. Those defenses, as I understand it, are not available in an antidumping case. Under the antidumping laws, the question is on the injury level for example; the inquiry is on the question of injury to competitors, perhaps ever a monopolistic competitor, whereas, under the antitrust laws, as I understand it, the question is whether there is injury to competition. Those may be but are not necessarily the same thing.

Senator MATHIAS. I think you raised a valid point in your statement that the enactment of the bill before us might involve some renegotiation of existing agreements or termination of existing agreements, allowing them to lapse or otherwise, but that isn't a bar to passing an act of Congress, is it?

Mr. PALMETER. Oh, no, Senator. Congress certainly has the legal authority under our system, as I understand it, to supersede international agreements and indeed, treaties of the United States.

Senator MATHIAS. Out of a tender regard for our commitments internationally, we might provide that the act would be effective at a convenient date at which these agreements would terminate.

Mr. PALMETER. My understanding is that the amendments to the International Antidumping Agreement were negotiated; the recent Tokyo Round in Geneva won't be effective until January 1 or some date thereafter.

So, I would think that perhaps our trading partners might be interested in giving the new code a chance to work before we violate it or propose it be amended.

Senator MATHIAS. It seems to me that many of the arguments that you have made here and which are very compelling arguments and that I think would be very forceful in a court of law, really are the kinds of things that you would advance as defenses in a court.

Mr. PALMETER. Senator, I don't think the law would permit me to ask many of them in a court. It seems to be a fact that price discrimination and price differentials, if you will, that are permitted to occur in the domestic market in the United States are not permitted to occur on the Antidumping Act and there is no defense to cite the Robinson-Patman Act.

I know of no successful way that an importer could challenge, for example, the practice under the law, of differentiating between what would be the fair value for the shipments depending upon whether they are sold on the water or out of the warehouse or before they are shipped.

Senator MATHIAS. Aren't those the difficulties of proof?

Mr. PALMETER. They can be at times.

Senator MATHIAS. They are not a bar to the action, but there are difficulties of proof.

Mr. PALMETER. Even if they are proved, the law on the one hand, the antidumping law to begin with, I think is probably more opaque than the Robinson-Patman Act in terms of understanding and speak to importers and exporters and vice versa. You have to give the definition to go back. But basically, it seems to provide that when the importer and the exporter are related and they talk about the date of exportation, except in certain circumstances, or if they are unrelated, then it becomes the date of importation, the time period that will be examined or what will be considered thereby; the Dumping Act talks about sales below fair value.

So the crucial question becomes: What is fair value? With some statutory guidelines as to timing, it becomes very, very crucial.

Senator MATHIAS. It seems to me what you are setting up is not as much objection, fatal objection to this legislation, as it is a challenge to the ingenuity of courtroom lawyers. From your own statement and familiarity with this law, I think you would be able to meet that challenge pretty well. I think it is a challenge to the courts and to the ability of judges to comprehend complex fact situations and to draw some legal conclusions from them. That is really what has been absent from our process up to date.

Mr. PALMETER. But there has been very little judicial review of antidumping cases. That is true. I can speak of why it does not occur, Senator, more often on the import side. That is because it gets to a question you raised with Mr. Barden on the collection of dumping duties.

Basically, the laws permit an importer to protest the assessment of any duty, including dumping duties. So, if the dumping duty is paid, you may obtain judicial review in the Customs Court, and through the Customs Court process eventually, perhaps, to the Supreme Court.

But the fact of the matter is that any well-counseled company rarely would pay dumping duties. It is not the intent of the act to collect them; at least in the 1921 act as it is administered and is written now,

an investigation is conducted to determine if there are sales, plus unfair value.

If it is determined that there are in a normal case—at that point—withholding of appraisement occurs and dumping duties would be collectable from that point on.

At that point, however, exporter and importer know what price has to be charged to avoid dumping duties. So, for example, the price of the goods in the United States is $1. The Treasury Department—later the Commerce Department—determines the fair value is $1.50. The importer has two choices. He may pay $1, plus a 50-cent dumping duty or he may pay $1.50 and no dumping duty.

From the exporter's point of view, that 50 cents can go in his pocket or the U.S. Treasury's pocket. The Treasury does not care as long as he raises the price to fair value. That usually is what occurs. That is the reason few dumping duties are actually paid.

Another reason they aren't paid or why there is not much litigation, the problem the importers have is that the 1979 law will ameliorate somewhat and that is the delay in the assessment. Some of these cases go on for years without the assessment of dumping duties.

Now this has been changed and there is now a time limit. We were somewhat amused from the American Importers Association point of view, because the general wisdom at the time seemed to be that these delays was to the advantage of importers.

We felt quite to the contrary, if an importer can't know what the duty will be on goods he brings in now for another 5 years, it creates enormous economic uncertainties and it also prevented importers from challenging in the courts because the right of judicial review is predicated upon the payment of the duty which can't be done until it is assessed.

So, by and large, the importers are quite delighted with the requirement that the customers service and whoever administers these laws be required to give prompt assessments of whatever dumping duties may be due.

Senator MATHIAS. But that again, it seems to me, is a problem of proof, a problem of evidence, or would be under this bill. It is an equally difficult problem for both parties.

Mr. PALMETER. On the assessment of dumping duties, that can be true, Senator. There is also a question of, I guess, if the administrators will administer. But, our problem is not a question of proof. Maybe it can be proved conclusively after the fact that between the date of contract and the arrival of the goods, the exporter changed his price and the wholesale price or the market value in the foreign country went up.

If that were stipulated, our fundamental challenge would be, "So what?" "Why should this man be subject to a $50,000 fine?"

Senator MATHIAS. That would be proof in defense.

Mr. PALMETER. I don't see that as a defense that exists in the bill as written, Senator. It speaks of the wholesale price and the market value at the time of the importation of the goods.

Senator MATHIAS. We could look at that question.

Does counsel have any questions?

Mr. CHUMBRIS. Mr. Chairman, I was going to make one observation. The rule of this committee is that when a witness comes before

it, that a statement should be submitted 72 hours prior to their appearance, for the principal reason to allow the Senators and the staff to thoroughly go over it, the statements and questions raised.

Particularly, this is an unusual type of an issue that comes before this subcommittee maybe three or four times in 20 years or so.

So, we will take a good look at your statement and submit questions to you in writing so that we would be fair with you and give you plenty of time to answer those questions.

Mr. PALMETER. I appreciate that very much. Thank you.

Senator MATHIAS. Thank you very much, gentlemen. We thank you for your testimony.

Mr. PALMETER. Thank you.

Mr. BEISPEL. Thank you, Senator.

Senator MATHIAS. I think it will be very useful to the committee. Our next witness is Mr. Fisher.

STATEMENT OF BART FISHER, ATTORNEY

Mr. FISHER. Mr. Chairman, my name is Bart Fisher. I am a partner in the law firm of Patton, Boggs & Blow, in Washington, D.C., an adjunct professor of international relations of the Georgetown University School of Foreign Service.

I am testifying today on S. 938, as a private party, at the invitation of the Judiciary Committee and not on behalf of any firm or organization.

As you know, the subject of dumping is much in the news these days.

The December 10, 1979, issue of Business Week, for example, discusses the recent collection of antidumping duties against $2.5 million worth of imported Japanese TV sets. They increase last week in that reference price for steel under the administration's trigger price mechanism threatened dumping actions by disaffected U.S. interest groups ranging from craft paper to chemicals, float glass and semiconductors.

In the November 20, 1979, announcement by the EEC exporters of arcrylic fibers.

Obviously then, dumping is an international problem of increasing magnitude. Large-scale, continuous dumping is clearly increasing. I have documented the increase in this type of dumping in appendix 1, to my testimony, which is an article that will appear next month in the University of Michigan Year Book of International Legal Studies.

Your bill, S. 938, attempts to strengthen the private enforcement actions of U.S. interests harmed by foreign dumping. I support the motivation and thrust of the bill, but feel that three important changes in the legislation should be considered.

First, the 1916 Antidumping Act should not be included in the listing of the U.S. antitrust laws.

Second, the 1916 act should be amended to provide an effective remedy for dumping by controlled economies, using the United States as a target market, and finally, the 1916 act, as several other witnesses have alluded, should confirm to the injury requirements of the International Antidumping Code that was recently adopted in the multilateral trade negotiations.

I would like to proceed through these points seriatum.

First of all, section 2 of S. 938 would include the 1916 Antidumping Act in the listing of the U.S. antitrust laws and section 1 of the Clayton Act. This would be unwise.

The 1916 Antidumping Act already contains a treble damage provision.

In addition, it does not explicitly provide for conventional antitrust defenses. Listing the 1916 Antidumping Act is an antitrust law, could, for example, permit putative defendants to successfully employ the conventional Robinson-Patman Act statutory defenses of cost justification, and good faith meeting of competition.

This could defeat the effort of your bill, S. 938, to move away from the intention test of the 1916 Antidumping Act by the substitution of other injury criteria in section 3, of S. 938, and could end up in severely limiting the remedies under the 1916 act.

In other words, where I differ from the prior witnesses is their assertion that it is a good thing to include the 1916 Antidumping Act under the antitrust laws because of the alleged benefits on the remedy side they would get from being under the Clayton Act.

They talked, for example, about getting injunctive relief and getting certain other benefits.

In my opinion, those benefits are minimal compared to the possible harm done by letting Robinson-Patman type defenses, which are already in the Clayton Act, be used in this kind of case.

I see that as limiting possibly the remedies under the 1916 act.

I must say that philosophically, I do see a need for a private remedy such as this in the dumping area. The point is one philosophically of the person who is injured by dumping being able to get his situation remedied versus the public remedy, the dumping laws.

For example, I once had a client in a dumping case that went bankrupt, yet, we won the case at the International Trade Commission and got a prospective antidumping duty which did my client no good. He had been injured and so his personal situation wasn't taken care of.

Your bill would beef up the private side of the situation which would be useful.

I would like to look secondly at the question of dumping from controlled economies. Now the one case under the 1916 act that has gone all the way through the procedure is the case involving Polish golf carts, the *Pesetel* case. I was involved in that case.

Senator MATHIAS. So was I.

Mr. FISHER. Let's assume that the People's Republic of China selects the United States as a target market for the exportation of widgets which are not used in the domestic market. It exports to no other countries. Under your bill, S. 938, the same denial of relief would flow as occurred in the Polish golf cart case under the 1916 act.

In that case, the court held that since golf cars were made by a nonmarket economy, for virtually exclusive importation into the United States and were shipped to no other third countries, there could be no cause of action under the 1916 act.

The court stated and the statute which is considered sufficiently unambiguous to withstand constitutional attack, the words "actual market value," convey a clear, unequivocal meaning that cannot be ignored.

In my view, S. 938, your bill, should be amended to make it clear

that the concept of actual market value includes any constructed substitute value as defined in the Tariff Act of 1913.

There are two ways of determining actual market value under the Tariff Act of 1913.

The first method employs the price at which the merchandise is freely offered in the home economy. If that situation doesn't exist, you can use the price of the merchandise that is freely offered for sale in the United States in the open market.

I think this alternate or substitute value provision would protect the controlled economy situation.

The court, in the *Pesetel* case, specifically denied that the 1916 act could have been given meaning and content by the 1913 act, and also invited the Congress to redefine the term "actual market value" in the 1916 act if it wanted a different result.

I believe that now is an appropriate time for such a redefinition. Failure to redefine actual market value will result in a paradoxical situation of making the 1916 Antidumping Act a remedy that is available only for market economy cases and not for nonmarket economy cases. I am sure that is not the intended result of the Congress.

Finally, I would like to, in some detail, go into the question of how your bill would relate to the recently adopted multilateral trade negotiations antidumping code.

The 1916 Antidumping Act is a penal law with criminal sanctions. An offender could be imprisoned for up to 1 year for violating its provisions. This is a rather serious consequence.

The 1921 Antidumping Act is a civil statute with no criminal sanctions. It would be logical for the probative injury test to be higher under the 1916 act than under the 1921 act.

As it stands, the reverse situation would be the case. The International Antidumping Code adopted in the recently concluded multilateral trade negotiations has a material injury test. This has been implemented by section 731, of the Trade Agreements Act of 1979, into U.S. domestic laws calling for material injury in the ITC determination on dumping cases.

So, S. 988 would trigger the act's criminal sanctions if one knowingly dumps goods that necessarily and directly injure an industry in any section of the United States.

In S. 938, your bill, no material injury standard is provided.

It would seem in order to conform the 1916 act to the international obligations of the United States to not impose antidumping duties unless material injury is found. If not, a lower injury standard would exist in a criminal or private enforcement statute than a civil, public enforcement statute, a result that could not be justified.

Mr. Chairman, we do need to reinvigorate the enforcement of our antidumping laws, both private and public. I would urge the committee to proceed, however, in a manner that does not muddy up the already murky legal water with inappropriate antitrust analogies that does not ignore the particularized problems of enforcement of the dumping laws against controlled economies and it does not undermine the international obligations of the United States.

Mr. Chairman, that concludes my comments. I would be glad to answer any questions that you may have.

Senator MATHIAS. Well, thank you very much.

Mr. Fisher, the previous witness made a comment and raised an objection on the ground of the difficulties of knowing, of knowledge. I wonder if you could, in the light of your experience, give us your views on that particular subject.

Mr. FISHER. I think that that is a technical problem frankly that could be addressed in different wording of your bill to assure that for each particular case we are talking about the person from whom that importer who is being involved in the case is purchasing the goods.

In other words, their complaint is that if the exporter say in France sells to another third party, in France, at a different higher price which would create a dumping situation.

I think we could remedy that situation in your statute and preserve the basic thrust of your bill. I see that, frankly, as a technical problem, because the Customs Service always faces these problems of defining the circumstances of sale in dumping cases. These are inordinately complex arithmetic computations, but you can take care of this in the context of your bill.

I don't see that as an insuperable problem. I see the real thrust of Mr. Palmeter's testimony though being along quite a different line which is that it is unfair to discriminate against imports. That is really what he is saying.

Senator MATHIAS. That is his basic point.

Mr. FISHER. That is his basic point.

Senator MATHIAS. As I said, if we were in a one-world, in a unitary world economy, he might be right.

Mr. FISHER. Absolutely. The point is that when the transaction crosses national frontiers, you do have a different regulatory situation whereby the dumping country——

Senator MATHIAS. And different consequences.

Mr. FISHER. And completely different consequences. I also disagree with the assertion that domestically we do not do this sort of thing against domestic sellers. The fact is that we do under the Robinson-Patman Act have a price discrimination statute within the United States that was enacted against the chain stores trying to put out, as you know, the Mom and Pop stores out of business.

So, we do have this kind of statute domestically. The dumping laws are just the international analog to the Robinson-Patman Act.

So, I don't see that there is a situation of discrimination.

Senator MATHIAS. Then on balance, you think with the amendments you have suggested, with some fine tuning and polishing, that this might be a useful addition to our law?

Mr. FISHER. Yes. I would like to comment as to why in some more detail. You are moving away, in your bill, from the intention test. It is very hard, especially in international proceedings, to find out what is in the minds of the fellow selling in the foreign country.

I think by your moving to an effects test as opposed to the intention test, that alone makes the whole bill very supportable and worthwhile. I think that alone could make the private remedy here meaningful.

I do have problems with, as I said, putting it under the technical listing of the antitrust laws. I think that is going to raise more problems for you than it will solve. And, I do have some problems with Mr. Palmeter's point about the time of importation language.

That should be cleaned up. But, overall, it would be a useful addition, in my opinion.

Senator MATHIAS. If you have the inclination and the time to supplement your testimony with some specific suggestions as to amendments, the committee would be very grateful to you and we would consider them thoughtfully.

Mr. FISHER. I would be glad to help you in any way I can or work with you or the staff.

Senator MATHIAS. Let me ask you one further question. One of the frustrations of the business community is the difficulty of getting action out of the Federal Government. Constituents have come to me over the years with dumping problems. I think they really would be happier if there were no antidumping law in terms of their personal state of mind because the Government holds up some purported relief for them. Yet, getting that relief, enjoying any benefit from it is a terribly frustrating experience.

Now do you believe that if the initiative were placed in the hands of the individual business to seek a remedy for his grievance in the court, that this would be a better trigger than appealing for some bureaucratic action within the Federal Government?

Mr. FISHER. Well, that is a question——

Senator MATHIAS. I put that question to you and it is a test of your objectivity as a practicing lawyer who might be involved in one way or another in these matters.

Mr. FISHER. That is a question which you put in a different way to Mr. Barden, at the opening, as to how effectively the laws are being administered.

Here I agree with Mr. Barden's comments that the new law, the Trade Agreements Act of 1979, on dumping, has speeded up time limitations, you see, which in effect is going to wind it up within 6 to 9 months in a guaranteed way.

So, the would-be domestic plaintiff I think is going to get a more rapid remedy under, and a guaranteed remedy either way, under the current dumping domestic law, the Antidumping Act of 1921.

In that sense, the time limits will play a crucial role in making sure that this important escape valve be present, because unless you have the escape valve of a properly functioning unfair competition laws, you will have the frustration we are talking about. And the frustration you are talking about, especially within the steel industry and the TV set industry and others lead to pressures for protectionism in the form of quotas or other import restraints that on an overall macroeconomic basis we may not want.

So, we better be very careful that we have a valid domestic track under the Antidumping Act which I think now we do. But I would say even having that, you still need the private remedy because you face the syndrome of the bankrupt plaintiff for whom his victory is a Pyrrhic victory in the Antidumping Act sense.

Now he has nothing. And, indeed, you can lower the bridge or raise the water as was alluded to in dumping cases so that the plaintiff really never gets anything out of the situation.

I think we need to assure U.S. interests who are harmed by predatory dumping that they have a remedy personal to them and not just a public remedy.

So, the problem of dumping is so complicated. There are so many different kinds of dumping, there is sporadic, there is continuous, there is predatory. I think your kind of bill should be honed to the predatory dumping situation to give a remedy to the private person harmed by it, and I think it does as it is worded.

So, I think it is useful.

Senator MATHIAS. Does counsel have any questions?

Mr. CHUMBRIS. Thank you, Mr. Chairman. We would like to reserve the right to submit some questions. You just made an interesting comment now that you mentioned three different items, but only one of them would be meeting the purposes of this bill.

Do you feel that on the other two points that you mentioned that we should not consider under this bill?

Mr. FISHER. What other ones, uncontrolled economies and——

Mr. CHUMBRIS. The other acts of antidumping, the issue.

Mr. FISHER. Oh, yes, sir. I would like to talk a little about it. It is a very important point on dumping as to what is dumping.

Mr. CHUMBRIS. Yes.

Mr. FISHER. You have to be clear that this kind of antitrust approach to dumping it seems to me should be reserved for the predatory or what Vener has defined as intermittent type of dumping.

The intermittent type of dumping is when you have the incursion swiftly into a market designed to knock out a comeptitor and then put yourself in the position to raise your prices at a later date. It is a predatory form of business behavior which there is a fair amount of consensus in the commentators that the laws of the United States should be aimed against, both the Antidumping Act of 1921 and this 1916 Antidumping Act even more strongly.

But when you have sporadic dumping which is either unintentional or sort of fire sale situations where a guy has some overload or stock left at the end of the year and he ships it into the United States, this is particularly in the case of Canada over the year where they have done accidental dumping.

I don't think this 1916 act should go to that kind of situation. The really difficult situation, I have given you the polar, the sporadic where most commentators would say that there is no way this bill should reach that, in the predatory, where everyone would agree that this bill should reach, is the continuous dumping situation where, as a matter of long-term Government policy, dumping takes place.

The problem now in dumping is that it has become so interfused with governmental policies, including in the EEC, the Dobinyon plan which almost sanctions dumping as a matter of EEC policy.

The question whether this private act should go against the continuous dumping situation, I would tend to resolve in the negative.

Mr. CHUMBRIS. What category would you put on the Bethlehem Steel point that was raised this morning? What category would you put in as antidumping?

Mr. FISHER. Well, it would depend on the particular dumping situation as was suggested. Since 1959 there has been an import problem in the steel industry. It has varied from the dumper, from Japan, over to the EEC.

The really remarkable thing is in the last 2 years dumping has really been more of a problem technically from the EEC than from Japan which was traditionally considered as the prime offender.

The problem in the EEC is that you would in effect be taking on the EEC's own published policy in the form of the Dobinyon plan which is a matter of public policy, designed to support the EEC's steel industry. Whether you want to take that burden on under this statute is not something I would be prepared to comment on.

It is a very difficult question.

I would say though in the case where you have a clearly predatory situation designed to knock out a U.S. producer, and I would put the TV set case and the tuners case, those two cases from Japan in that category.

Mr. CHUMBRIS. The same category?

Mr. FISHER. Yes. I think this bill should reach that case.

The steel case, it would depend on whether you could have a predatory steel dumping case that should be reachable. Now whether or not—so it would depend upon which one we are talking about.

Mr. CHUMBRIS. Because you are so knowledgeable you anticipated my next comment. Senator Bayh, 2 years ago, raised the question of the TV sets from Japan and the problem that it created with the American television manufacturers. That was one of the things that Senator Thurmond had inserted in the record this morning. He read it. He also was concerned about textiles. Other Senators are concerned about other products that affect their particular States or regions of the country.

I am very thankful for your comment here this morning.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you.

Mr. Cooper.

Mr. COOPER. Thank you, Mr. Chairman.

I just have a couple of questions about your comments concerning the relationship of this proposal and the antitrust laws and the existing antidumping statutes. I hope I don't display my own ignorance of the relationship through questions.

You said earlier in your prepared statement that the antidumping statutes now do not specifically include antitrust defenses.

Then, later on in response to a question from the Senator, I think you were talking about Mr. Palmeter's hypothetical, you said that the antidumping statutes were the international equivalent of the Robinson-Patman Act which does include the cost justification defense and the medium of other lawful prices.

Do you mean by that that the antidumping statutes implicitly have antitrust defenses or is it that it just has not been determined yet?

Mr. FISHER. Well, the basic point is that Mr. Palmeter was saying that there is a discrimination inherent in this kind of statute against imports. My argument is that is not the case because overall there is an analogy between the Robinson-Patman Act and the antidumping law.

The Robinson-Patman Act was held in the *Pesetel* case to not reach dumping.

So, we have pretty clearly demarcated areas that are roughly parallel.

In the case of the dumping laws, there are no Robinson-Patman type act offenses which are acceptable. In that, Mr. Palmeter was quite correct.

The issue in a dumping case is whether there is material injury to a domestic industry. It is a rather straightforward inquiry without the subtle sort of defenses you do get in the Robinson-Patman situation.

Mr. COOPER. My second question relates to the remedies which you raised initially. I believe you said that you sense that one of the reasons this was made part of the antitrust laws was the availability of broader scope remedy, not only the treble damages, but you also mentioned equitable relief, the injunctive relief.

Mr. FISHER. Injunctive relief, yes.

Mr. COOPER. Preliminary injunction.

Mr. FISHER. Yes.

Mr. COOPER. Temporary restraining order.

Mr. FISHER. Yes.

Mr. COOPER. I have two questions relating to that. First, how important is equitable relief for private parties in this context?

Second, by removing this from the antitrust laws will we be somehow precluding equitable relief in a dumping situation?

Mr. FISHER. I don't know. I don't know how important injunctive relief is. I think most courts would be very reluctant to invoke it in any case. I think it is an academic question, frankly.

An injunction would be the functional equivalent of an embargo. I don't see the courts invoking that.

So, I think that is a rather illusory benefit from putting it under the antitrust laws. And you face the really real problem of permitting a judge that wanted to do it to resurrect some of the Robinson-Patman or conventional antitrust offenses.

Mr. COOPER. So in your view, the principal benefit of S. 988, so far as they remedy stage goes, is providing for relief for a past injury as a result of violations of the Antidumping Act?

Mr. FISHER. Yes; treble damage which is already there, but that can be quite effective.

Mr. COOPER. Thank you.

Senator MATHIAS. Thank you very much, Mr. Fisher.

Mr. FISHER. Thank you.

Senator MATHIAS. Your testimony is very helpful to us. We will appreciate hearing from you.

Mr. FISHER. Yes, sir.

Senator MATHIAS. And any specific ideas that you may have.

Mr. FISHER. I will be glad to work with you.

Senator MATHIAS. Thank you. Our last witness this morning will be Mr. David Hartquist, counsel for the Tool and Stainless Steel Industry Committee.

STATEMENT OF DAVID HARTQUIST, ATTORNEY, TOOL AND STAINLESS STEEL INDUSTRY COMMITTEE

Mr. HARTQUIST. Thank you, Mr. Chairman.

Mr. CHUMBRIS. Mr. Chairman, Mr. Hartquist used to be one of us up here.

Mr. HARTQUIST. Yes, that's correct.

Senator MATHIAS. We are glad to welcome his return to Capitol Hill with broadened horizon and even greater depth of knowledge as a result of being out in the real world.

Mr. HARTQUIST. Thank you, Mr. Chairman.

I am appearing this morning as counsel to the Tool and Stainless Steel Industry Committee known as TSSIC. I am a partner in Collier, Shannan, Real, Edwards, and Scott.

I might, before I get into my prepared statement, respond briefly to a couple of the comments made by Mr. Palmeter regarding S. 938. He made the point, I think very effectively, that this kind of an approach is unfair to innocent importers. But I think his concerns are vastly overstated for a number of reasons.

First, I think that under the logic of his rationale, all of our antidumping laws would have to be repealed because there again, the importer is the one who is at risk when foreign dumping occurs.

Second, your bill, Senator, protects against the importer, against importer liability in a one-shot situation where he may not have knowledge of the foreign seller's pricing practices in the home market.

The reason your bill protects against that kind of a situation is as follows.

First of all, S. 938 requires sales at substantially less than foreign price.

Second, S. 938 requires proof of injury or restraint of trade or monopolization. That implies a series of transactions over a period of time, not merely an odd sale or two.

Third, I really think it is something disingenuous for importers to claim that they have no knowledge of dumping. We come across this argument all the time.

In the real world, U.S. producers frequently express public concern over what they think may be unfair trade cases before an antidumping case is ever filed.

So, there is some notice, frequently. Certainly that has been true in the steel industry for a number of years.

Second, importers are well aware of the prices being charged by U.S. companies, U.S. manufacturers in the domestic marketplace and where foreign prices are substantially less than domestic prices, even after you add freight, insurance, customs duties and so forth, it should at least raise a question in an importer's mind as to whether dumping might be occurring.

Last, I think, as you pointed out, Senator Mathias, as a matter of public policy, foreign dumping is very different from domestic unfair trade practices. Foreign dumping directly undercuts U.S. jobs and drives U.S. firms out of business.

United States versus foreign is very different from United States versus United States in a competitive context.

TSSIC is a trade association composed of the American producers of tool and stainless steel products, commonly known as the specialty steel industry.

Most specialty steel producers are smaller companies in comparison with the carbon steel companies. The tool and stainless steel products we produce as generally high-value materials used for a wide range of industrial and military applications, including energy production, transportation, communications, jet aircraft, surgical instruments, and food processing.

At the outset, Mr. Chairman, let me say that the U.S. specialty steel industry is modern and efficient—it can compete favorably with

foreign producers given fair competitive conditions. We are not "protectionist." We do vigorously support enforcement of our laws against unfair trade practices.

I can state our position on this important legislation in three short words: "We're for it."

The primary reasons why the specialty steel industry supports this legislation are as follows:

First, it is timely. Many of the members of this subcommittee are aware that the current quotas on specialty steel imports expire on February 13, 1980, despite our efforts to get an extension of the import relief program for another 8 years.

In that effort, I should add, we were strongly supported by Senator Mathias, and other members of this subcommittee, including Senators Bayh and Thurmond.

It is clear to us that unfair trade practices will continue in the specialty steel area, and which have characterized trade in this area, will need effective tools to deal with this problem.

Second, the Antidumping Act in the past has been inadequate to deter dumping. For example, TSSIC members won two antidumping cases several years ago against one Swedish stainless plate in 1973, and a second against French stainless wire rods the same year.

Yet, to our knowledge, not one cent in antidumping duties has been collected. Treasury could not even tell us how much was due. It may be that dumping ended, but we don't think so.

Senator MATHIAS. We hope these hearings will shed some light on that difficult question.

Mr. HARTQUIST. We think dumping has continued periodically since the original findings in these cases. We have initiated procedures under section 516 of the Antidumping Act to force collection of duties by the Government, but we have encountered various stalling tactics by Treasury, including being told that both our filings were somehow "lost."

Without getting into all the details of our frustrations, my point is that the law has not been enforced, therefore has not had a deterrent effect on dumping.

The Antidumping Act, as you know, was amended by Congress last summer. The law has been strengthened, and under the President's reorganization plan, jurisdiction will be transferred to the Department of Commerce shortly. We hope for a more effective enforcement of this law.

Nevertheless, the Mathias bill would allow U.S. industries and labor to take action on their own if necessary to prevent dumping.

Third, I am personally familiar with this legislation, having worked with an American Iron and Steel Task Force last year which developed a similar proposal. TSSIC at that time strongly endorsed that proposal, and we are delighted that this subcommittee is actively considering S. 988 now.

In addition to the policy reasons for our support of this bill, TSSIC believes this legislation will substantially improve the effectiveness of the Revenue Act of 1916, for the following reasons:

First, the 1916 act has not been an effective tool for over 60 years. As you may know, Mr. Chairman, this statute is currently being subjected to an important test in a massive antidumping case brought by

Zenith Radio Corp. against Japanese television producers. This litigation will help to show the effectiveness of the current law.

Regardless of the outcome of the *Zenith* case, however, we believe the Unfair Foreign Competition Act of 1979 will considerably strengthen and clarify the 1916 act.

Two, failure to include the provisions of the 1916 act within the scope of the antitrust laws was a legislative oversight.

The restraint of trade and monopolization language, along with the treble-damage provision of the 1916 act were copied from the original Sherman Act 2 years after passage of the original Clayton Act.

The 1916 act was, we believe, intended to be part of the antitrust laws. The 1916 act condemns a predatory commercial practice which is injurious to competition. The law intended to provide a criminal sanction as well as a civil remedy.

We believe that failure to have included as an antitrust statute within section 1 of the Clayton Act was simply a legislative oversight.

In order to correct that oversight, the 1916 law would be amended by the Mathias bill by providing that the 1916 act will be one of the antitrust laws defined in section 1, of the Clayton Act, and will therefore be subject to the important remedial provisions of sections 4, 4B, and 15 and 16 of the Clayton Act.

S. 938 would thus provide both the U.S. Government and injured private parties a remedy of injunctive relief which is not now available.

In addition, this legislation would encourage private actions by making Government judgments and decrees prima facie evidence of violations of private suits.

Third, S. 938 would also amend the criminal sanctions by increasing the maximum fine to $50,000, consistent with the 1955 amendment to section 1, of the Sherman Act, and albeit somewhat modestly, with the inflationary trend in the economy.

Fourth, the venue and discovery provisions of S. 938 are desirable in that they would further strengthen the effectiveness of the statute.

Mr. Chairman, this bill recognizes that dumping is a direct attack on fair competition. It can be as destructive in the marketplace as any of the well-known violations of our antitrust laws.

You represent within your constituency both Bethlehem Steel and Armco Steel, both members of TSSIC. You are well aware that this anticompetitive practice is directly responsible for the loss of jobs and deterioration of otherwise healthy and vigorous industries in this country.

The specialty steel industry has been and will continue to be alert to unfair trade practices whenever and wherever they occur.

Other industries, unfortunately, have been less aggressive and less successful in dealing with these problems. Mr. Fisher referred to this, the case of the bankrupt plaintiff. This legislation would correct a long-standing inadvertent legislative oversight and would have a positive deterrent effect. The specialty steel industry will do all it can to insure passage of this important legislation.

Thank you.

Senator MATHIAS. Thank you very much, Mr. Hartquist.

It is a very thoughtful statement. I appreciate your charitable words with respect to the bill.

If the bill is enacted, and if dumping would then be considered an antitrust offense, what do you think of the proposition that the parens patriae remedy under which for instance a State attorney general can sue on behalf of an injured consumer, might be applied to permit the attorney general of a State to sue for dumping injuries?

Mr. HARTQUIST. That is an interesting proposition, Senator, which we haven't considered as a policy matter within the industry. There are some arguments which we frequently face that the consumer is a beneficiary of dumping because he is able to buy products at a lesser price than he would be able to buy without dumping.

So that the position of the consumer might be somewhat—he might have a dilemma on this because he is facing a loss of domestic jobs.

Senator MATHIAS. The consumer is the beneficiary of dumping perhaps for a limited period of time.

Mr. HARTQUIST. Yes, indeed.

Senator MATHIAS. Until the dumper, assuming it is done with intent to injure, and if possible, to fatally injure your competition, until the dumper has achieved a monopoly. Thereafter, the consumer may not be the beneficiary because the vital force of competition will thereafter be absent from the marketplace.

Mr. HARTQUIST. Precisely. We have seen cases where foreign producers have driven a whole industry from the marketplace, and in effect, monopolized that marketplace and then tremendously increased their prices.

So, I am not suggesting that is the answer.

Senator MATHIAS. Well, at least it is a thought to mull over. I have no fixed concepts in this regard. The parens patriae principle might be applied and prove to be a useful tool. It is worth thinking about at any rate.

Mr. HARTQUIST. Yes, it is. We will give it some thought and respond to you on that.

Senator MATHIAS. Mr. Fisher raised the question of whether more would be lost than gained by inclusion in the antitrust laws. Do you think there would be a role for the Justice Department in the criminal enforcement of the law?

Mr. HARTQUIST. Yes, there certainly should be.

Senator MATHIAS. In addition to the private trigger of the ability to go into court?

Mr. HARTQUIST. Yes; I would think that passage of this legislation ought to provide a message to the Justice Department that they should take their responsibilities under these provisions seriously and proceed on their own where they have knowledge of these kinds of practices without the necessity of private cases being initiated.

Senator MATHIAS. Well, if, as Mr. Barden testified, there have been no prosecutions under the 1916 act, it would appear to be a fairly ineffective, totally ineffective, measure.

Mr. HARTQUIST. To date that has been the case. I might add, Mr. Chairman, that we have noted with considerable interest statements which have been given recently by various representatives of the Justice Department concerning their scrutiny of antidumping cases in the future as being possible anticompetitive practices, that is, the use of the filing of a case in itself as an anticompetitive practice.

Obviously, we feel that that is simply not the case because what we have here is domestic industries being injured, taking advantage of existing U.S. legislation to protect their interests.

Senator MATHIAS. Of course, you can recall from your previous experience here that we have never lacked for statements from the Justice Department on this subject. I sat through a good many hearings on the television case a couple of years ago which has already been mentioned.

Mr. HARTQUIST. Yes.

Senator MATHIAS. We had some very fine statements made at that time. But they always were prospective about what would happen. But, about what was going to be done, not what had been done, what had happened. That tends to wear a little thin after a while.

Mr. HARTQUIST. Yes, indeed. That is why we feel that this kind of legislation is so desirable.

Mr. CHUMBRIS. Your question I take it was to the Attorney General, as well, at his nomination hearing, at that time.

Senator MATHIAS. Yes.

Mr. CHUMBRIS. To look into that issue.

Senator MATHIAS. I believe you are correct. That was one of the issues raised with the Attorney General at the time he was confirmed.

Mr. CHUMBRIS. Mr. Bell.

Senator MATHIAS. Well, this, of course, is a continuation of that interest and a means of providing a practical spur to action which we have not been able to achieve by other means up to this time from 1916 to this present time, more than 60 years.

Does counsel have questions?

Mr. CHUMBRIS. No, thank you.

Mr. COOPER. No.

Senator MATHIAS. Thank you very much, Mr. Hartquist.

Mr. HARTQUIST. Thank you, Mr. Chairman.

[The prepared statement of Mr. Hartquist follows:]

PREPARED STATEMENT OF DAVID A. HARTQUIST

Mr. Chairman and members of the Subcommittee: I am David A. Hartquist, counsel to the Tool and Stainless Steel Industry Committee (TSSIC) and a partner in Collier, Shannon, Rill, Edwards & Scott. I sincerely appreciate the invitation to testify before you on S. 938, the Unfair Foreign Competition Act of 1979.

TSSIC is a trade association composed of the American producers of tool and stainless steel products, commonly known as the specialty steel industry. Most specialty steel producers are smaller companies in comparison with the carbon steel companies. The tool and stainless steel products we produce are generally high-value materials used for a wide range of industrial and military applications, including energy production, transportation, communications, jet aircraft, surgical instruments, and food processing.

At the outset Mr. Chairman, let me say that the U.S. specialty steel industry is modern and efficient—it can compete favorably with foreign producers given fair competitive conditions. We are not "protectionist." We do strongly support vigorous enforcement of our laws against unfair trade practices.

TSSIC STRONGLY SUPPORTS S. 938

Mr. Chairman, I can state our position on this important legislation in three short words: "We're for it." The primary reasons why the specialty steel industry supports this legislation are as follows:

1. It is timely. Many of the members of this Subcommittee are aware that the current quotas on specialty steel imports expire on February 13, 1980, despite our efforts to get an extension of the Import Relief Program for another three years. In that effort, I should add, we were strongly supported by the sponsor of S. 938, Senator Mathias, and other members of this Subcommittee, including Senators Bayh and Thurmond. It is clear to us that unfair trade practices will continue in the specialty steel area, and we will need effective tools to deal with this problem.

2. The Antidumping Act in the past has been inadequate to deter dumping. For example, TSSIC members won two antidumping cases several years ago one against Swedish stainless plate in 1973, and a second against French stainless wire rods the same year. Yet, to our knowledge, not one cent in antidumping duties has been collected. Treasury could not even tell us how much was due.

We think dumping has continued periodically since the original findings in these cases. We have initiated procedures under Section 516 of the Antidumping Act to force collection of duties by the government, but we have encountered various apparent stalling tactics by Treasury, including being told that both our filings were somehow "lost."

Without getting into all of the details of our frustrations, my point is that the law has not been enforced, therefore has not had a deterrent effect on dumping.

The Antidumping Act, as you know, was amended by Congress last summer. The law has been strengthened, and under the President's reorganization plan, jurisdiction will be transferred to the Department of Commerce shortly. We hope for a more effective enforcement of this law.

Nevertheless, the Mathias bill would allow U.S. industries and Labor to take action on their own if necessary to prevent dumping.

3. I am personally very familiar with this legislation, having worked with an American Iron and Steel Task Force last year which developed a similar proposal. TSSIC strongly endorsed that proposal, and we are delighted that this Subcommittee is actively considering S. 938 now.

REASONS WHY S. 938 SHOULD BE ENACTED

In addition to the policy reasons for our support of S. 938, TSSIC believes this legislation will substantially improve the effectiveness of the Revenue Act of 1916, for the following reasons:

1. The 1916 Act has not been an effective tool, for over 60 years. As you may know, Mr. Chairman, this statute is currently being subjected to an important test in a massive antidumping case brought by Zenith Radio Corporation against Japanese television producers. This litigation will help show the effectiveness of the current law.

Regardless of the outcome of the Zenith case, however, we believe the Unfair Foreign Competition Act of 1979 will considerably strengthen and clarify the 1916 Act.

2. Failure to include the provisions of the 1916 Act within the scope of the antitrust laws was a legislative oversight.

The restraint of trade and monopolization language, along with the treble-damage provision of the 1916 Act were copied from the original Sherman Act two years after passage of the original Clayton Act. The 1916 Act was, we believe, intended to be part of the antitrust laws. The 1916 Act condemns a predatory commercial practice which is injurious to competition. The law was intended to provide a criminal sanction as well as a civil remedy. We believe that failure to have included as an antitrust statute within Section 1 of the Clayton Act was simply a legislative oversight.

In order to correct that oversight, the 1916 law would be amended by the Mathias bill by providing that the 1916 Act will be one of the antitrust laws defined in Section 1 of the Clayton Act, and will therefore be subject to the important remedial provisions of Sections 4, 4B, 5, 15 and 16 of the Clayton Act. S. 938 would thus provide both the United States Government and injured private parties a remedy of injunctive relief which is not now available. In addition, this legislation would encourage private actions by making government judgments and decrees prima facie evidence of violations in private suits.

3. S. 938 would also amend the criminal sanctions by increasing the maximum fine to $50,000, consistent with the 1955 amendment to Section 1 of the Sherman Act and albeit somewhat modestly, with the inflationary trend in the economy.

4. The venue and discovery provisions of S. 938 are desirable in that they would further strengthen the effectiveness of the statute.

Mr. Chairman, this bill recognizes that dumping is a direct attack on fair competition. It can be as destructive in the marketplace as any of the well-known violations of our antitrust laws. Senator Mathias represents within his constituency Bethlehem Steel and Armco Steel, both members of TSSIC. He is well aware that this anticompetitive practice is directly responsible for the loss of jobs and deterioration of otherwise healthy and vigorous industries in this country. The specialty steel industry has been and will continue to be alert to unfair trade practices whenever and wherever they occur. Other industries, unfortunately, have been less aggressive and less successful in dealing with these problems. This legislation would correct a long-standing inadvertent legislative oversight and would have a positive deterrent effect. The specialty steel industry will do all it can to ensure passage of this important legislation.

Senator MATHIAS. I appreciate your statement and your presence here today.

The committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 11:38 a.m., the hearing adjourned, subject to the call of the Chair.]

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APPENDIX

Questions of Senator Thurmond and Responses of Mr. Patterson

Question. As we look at the steel industry of the United States from a national security viewpoint, would you explain for us the overall long-term outlook if we attempt to continue "business-as-usual" with other nations in the international trade area?

Answer. A continuation of present government policies affecting the domestic steel industry can only lead to increased dependence on foreign steel and a corresponding instability of supply which has obvious adverse implications for the ability of the domestic industry to satisfy our national defense requirements. If dumped and subsidized foreign steel is permitted to continue to have unrestrained and disruptive access to the U.S. market, the industry will not be able to justify the capital investment needed to preserve a modern and competitive domestic steel industry, and the involuntary liquidation of the industry that has been occurring in recent years will accelerate.

The national security implications of such a scenario must be considered not only in the context of mere availability of critical materials, but also in the context of the serious adverse impact on the economic health of the nation caused by excessive dependence on foreign sources of critical materials. The present situation with energy should not be permitted to spread to other critical materials.

Question. You have indicated that you feel S. 938 "is a bill worthy of enactment." Yet, I seem to sense that you really feel we should develop and enact stronger and more clearly workable legislation if we are to obtain the response we need to protect our nation's industries from injurious dumping practices. Is my interpretation of your feeling correct and would you comment further regarding this matter?

Answer. I did not mean to imply that I was advocating a more radical solution to the dumping problem at this time. The Congress has been responsive to domestic industries' complaints about lax enforcement of the trade laws and has attempted to address that situation in the Trade Agreements Act of 1979. I personally believe that this Act should be tested before further radical changes in the dumping laws are advocated.

On the other hand, I do not believe that the amendments to the 1916 Act proposed in S. 938 are radical or counterproductive to the legislative effort resulting in the Trade Agreements Act of 1979. S. 938 is a responsible effort to improve the effectiveness of an existing statute that complements the Trade Agreements Act of 1979. Although there are obviously ways in which S. 938 could be modified to make private treble damage actions more attractive to domestic industries which are injured by dumping, I am reluctant to advocate changes which would be likely to result in a major shift in antidumping enforcement from the Government to private litigants until the Government has been tried and proved wanting under the Trade Agreements Act of 1979 and the President's reorganization plan.

Question of Senator Thurmond for Mr. Barden

Mr. Barden, during some hearings conducted in May 1977, I had a most interesting discussion about imports with Assistant Secretary of the Treasury for International Affairs, Mr. Bergsten. He had discussed, as you have, a broad range of import policy situations. I am concerned, of course, with the overall export-import situation for many reasons, not the least of which is the critical nature of our United States trade balance.

I have particular concerns, however, about textiles. While I am from a region that has a heavy concentration of textile employment and production, the problems of the textile industry are not problems of that region alone, they are problems of national concern.

In recent years, textile imports have continued to rise sharply; our textile exports have increased only moderately; and thus we are faced with textile industry trade deficits of higher and higher amounts. The ballooning national trade deficit is a major factor behind the loss of confidence in the U.S. dollar abroad and that, in turn, has added to our domestic inflation rate. At the same time, it is reported that the 10 largest publicly held textile makers managed to score only a meager 3.3 percent average return on sales during 1978 versus 10.5 percent for industrial corporations as a whole.

I am just wondering how our textile industry is going to stay in business when such conditions as this exist for very long; especially in view of the fact that the wage rate of the textile workers in this country is 5 to 10 times higher than in many other countries that send imports in here. The textile and apparel industry provides more jobs for American workers than any other industry. It is number one.

The Defense Department says that textiles ranked second to steel during the wartime years. If textiles are that important, it is essential that we not become dependent on foreign countries for our textiles. If our mills are forced out of business, then we will be dependent upon foreign countries.

Question. What is your reaction to this situation and how do you feel S. 938, or some similar type legislation, could help alleviate this problem situation?

[No response was forthcoming.]

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

December 5, 1979

Dear Mr. Chairman:

The Treasury Department appreciates the invitation to testify before your Subcommittee in connection with S.938, the Unfair Foreign Competition Act of 1979. The bill would amend the so-called "Antidumping Act of 1916" (15 U.S.C. 72) and is, therefore, closely related to the Antidumping Act, 1921, as amended (19 U.S.C. 160, et seq.). The Department believes it would be most appropriate and, hopefully, useful to the Subcommittee, if the Treasury official chiefly responsible for the Department's administration of the 1921 Antidumping Act were to testify. Since that individual, Robert H. Mundheim, the General Counsel of the Department, necessarily is out of the country this week on urgent matters relating to the freezing of Iranian assets, he will be unable to testify on December 6.

A few general statements on the bill may be of assistance to the Subcommittee in the meantime. The present Antidumping Act of 1916 has proved to be ineffective because of its requirement of proof that an exporter intends to dump and injure a United States industry. Such a burden of proof is difficult to sustain. Given the great complexity of determining whether, in fact, foreign merchandise is being sold at dumping prices, it is questionable whether the requirement in section 3(a) of the bill, that an importer "knowingly and purposely" be importing at dumping prices imposes any less burden in reality. This is especially significant since usually only exporters, not importers, are in possession of sufficient information to form any judgment as to whether dumping may be occurring. Even exporters may find it difficult to ascertain whether their prices to the United States are above or below their home market prices, given the frequently numerous and complex price adjustments to reflect differences in conditions and terms of sales, physical difference in the merchandise sold in each market, and other differences which are necessary before reasonable, equitable price comparisons can be made.

The Department's experience in administering the Antidumping Act of 1921, under which most investigations require extensive analysis of facts and complex price adjustments, calls

into question the efficacy of any test based upon a showing of intent. Further, that experience, in an ever-growing number of cases, has shown that the 1921 Act is utilized frequently by domestic industries, and, in our judgment, has proven effective in bringing to a halt injurious dumping practices. Nonetheless, in response to the growing concerns of some domestic industries and many members of Congress that the 1921 Act was not as effective as it should be, that Act was substantially amended in July of this year as part of Title VII of the Trade Agreements Act of 1979 (P.L. 96-39, July 26, 1979). The new law, will become effective January 1, 1980, and will, be administered by the Department of Commerce. It substantially reduces the time limits for determinations, provides significantly greater opportunities for representatives of domestic industries to acquire information relied upon in making determinations and participate in antidumping proceedings, and establishes more opportunities for judicial review of agency determinations under the law.

With these changes, the effectiveness of the law in dealing with problems to U.S. industries caused by dumping practices should be greatly enhanced. The Subcommittee may wish to delay action on the bill until enough time has elapsed to make some judgment about the efficacy of the new law. Further, careful consideration should be given to questions concerning the logic and consistency of the bill with other provisions of U.S. law, in addition to the antidumping provisions discussed above, such as the countervailing duty law and the escape clause and market disruption provisions of the Trade Act of 1974, as well as with the international obligations of the United States, in particular the International Antidumping Code.

The Department will welcome the opportunity to give more detailed views on S.938 both in writing and at a hearing in the near future.

Sincerely yours,

for Eugene E. Godley
Assistant Secretary
(Legislative Affairs)

The Honorable
Howard Metzenbaum
United States Senate
Washington, D.C. 20510

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